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DEPARTMENT OF HOMELAND SECURITY

U. S. COAST GUARD

STATEMENT OF

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ON THE

REBUILDING VESSELS UNDER THE JONES ACT

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

SUBCOMMITTEE ON COAST GUARD AND MARINE TRANSPORTATION

U. S. HOUSE OF REPRESENTATIVES

JUNE 11, 2008

Good morning Mr. Chairman and distinguished members of the Committee. It is a pleasure to appear before you today to discuss the rebuilding of vessels under the Jones Act. This statement discusses the current regulations and Coast Guard administration of rebuilding vessels under the Jones Act, and highlights the challenges of recent Coast Guard rebuild determinations.

As you know, the Coast Guard seeks to administer the Jones Act in good faith through consistent regulatory actions and vessel determinations. However, we believe additional legislative clarity is necessary to improve the efficacy and context of our agency's adjudicatory actions. This would necessarily involve refinement of the Second Proviso including more precise definitions of the statutory terms "major component" and "considerable part." I look forward to discussing these and other facets of our responsibilities during our session today.

Administration of Vessel Rebuild Determinations under the Jones Act

Vessel rebuild determinations under the Jones Act are administered by the Coast Guard primarily by regulations stipulated in 46 C.F.R. § 67.177. The regulatory standard in § 67.177 states that a vessel is rebuilt when "any considerable part of its hull or superstructure is built upon or substantially altered." While the wording of the regulatory standard has remained stable over the years, the Coast Guard's administration of the standard has evolved.

Prior to September, 1989, the Coast Guard evaluated whether work performed on a vessel constituted a rebuilding under the regulatory standard by focusing on whether the nature of the work was structural or nonstructural. In September of 1989, the Coast Guard issued a rebuild determination for work performed on the vessel MONTEREY. The MONTEREY determination explained that application of the Coast Guard's regulatory standard involved a two-step process. The first step was to identify the work which involves building upon or alteration of the hull or superstructure. Once the relevant work has been identified, the second step was to determine whether that work involved a considerable part of the hull or superstructure. If it did, then the vessel had been rebuilt.

However, the MONTEREY determination was challenged in court by a vessel owner and trade association and the matter was remanded. American Hawaii Cruises v. Skinner, 713 F.Supp. 452 (D.D.C. 1989), *appeal denied* 893 F.2d 1400 (U.S. App. D.C. 1990). The District Court determined the Coast Guard's regulatory definition of "rebuild" was a permissible construction of the Jones Act. However, the Court held that the structural/nonstructural test was not a permissible construction of the Jones Act. The Coast Guard had employed this test for many years. Nevertheless, the Court noted that the Coast Guard's approach was not subject to deference because it had neither been made contemporaneously with the statute nor applied consistently over time. The Court further felt there were no standards for it to engage in judicial review and the case was remanded to the Coast Guard with instructions to give further definition to the structural test.

The Coast Guard responded to the remand by seeking public input on the advisability of engaging in a rulemaking. Two public meetings were held (November 16, 1993 (58 FR 51298) and February 15, 1994 (59 FR 725)), both preceded by a notice in the Federal Register, the stated purpose of which was to obtain public input concerning whether the Coast Guard should undertake a rulemaking to develop clearer standards for vessel rebuild determinations, whether a negotiated rulemaking procedure would be appropriate, and to discuss challenges encountered under existing procedures, as well as potential solutions. Following the publication of a Policy Statement in the Federal Register (May 10, 1994 (59 FR 24060)), followed by a Notice of Proposed Rulemaking (April 5, 1994 (60 FR 17290)), the current regulatory standards contained within 46 C.F.R. § 67.177 were promulgated as a Final Rule (April 22, 1996 (61 FR 17814).

The current regulations at 46 C.F.R. § 67.177 provide, in relevant part, as follows:

"§ 67.177 Application for foreign rebuilding determination

A vessel is deemed rebuilt foreign when any considerable part of its hull or superstructure is built upon or substantially altered outside of the United States. In determining whether a vessel is rebuilt foreign, the following parameters apply:

(a) Regardless of its material of construction, a vessel is deemed rebuilt when a major component of the hull or superstructure not built in the United States is added to the vessel.

(b) For a vessel of which the hull and superstructure is constructed of steel or aluminum –

(1) A vessel is deemed rebuilt when work performed on its hull or superstructure constitutes more than 10 percent of the vessel's steelweight, prior to the work, also known as discounted lightship weight.

(2) A vessel may be considered rebuilt when work performed on its hull or superstructure constitute more than 7.5 percent but not more than 10 percent of the vessel's steelweight prior to the work.

(3) A vessel is not considered rebuilt when work performed on its hull or superstructure constitutes 7.5 percent or less of the vessel's steelweight prior to the work."

As can be seen, the original standard --- that a vessel is deemed rebuilt "when any considerable part of its hull or superstructure is built upon or substantially altered" --- was retained. However, it was amplified clarified by the application of two separate regulatory parameters developed by Agency practice:

(i) Percentage parameters are applied to the calculation of steelwork performed on the hull or superstructure to determine whether, according to those parameters, a "considerable part" of the hull or superstructure will have been built upon; and

(ii) Proposals are examined to determine whether a "major component" of the hull or superstructure not built in the United States will be added to the vessel.

In addition, the current regulations codify the Coast Guard's past practice of allowing vessel owners to seek a preliminary determination of whether the proposed work would constitute a rebuild. There is no requirement, however, that vessel owners seek a preliminary determination before having foreign work done. If, the Coast Guard advises vessel owners who receive preliminary determinations that proposed foreign work does not constitute a rebuild, then those vessel owners must confirm and convey the completion of proposed work to the Coast Guard for determination of the status of the vessel's coastwise endorsement.

The Coast Guard also makes final determinations on applications from vessel owners. There is no requirement that a vessel owner seek a final determination after having foreign work done. However, vessel owners who have foreign work done are required to seek a new Certificate of Documentation and, if such an owner chooses to renew their coastwise trade endorsement, they are required to certify to the Coast Guard that their vessel has not been rebuilt foreign. Beyond loss of coastwise trading privileges, other severe penalties apply for providing a false certification, including total forfeiture of the vessel and potential felony criminal sanctions.

Challenges of Rebuild Determinations

Certain problems arising from lack of express definitions persist in the current regulatory scheme but the Coast Guard has attempted to steer a consistent path. For example:

In what might be called the "considerable part" parameter of the test, "steelweight" and "discounted lightship weight" are not expressly defined but have been interpreted to calculate the actual steel weight of the vessel, excluding machinery, fluids, furnishings and what are referred to as "outfit items", examples of which were published by the Coast Guard in the Notice of Proposed Rulemaking. Also, while the Coast Guard required applicants to calculate both the weight of steel proposed to be removed from the vessel as well as the weight of steel proposed to be added, it has based its determinations on the greater of the two. This represents a middle, yet conservative, course between those who would have the Coast Guard examine only the net effect of the removed and added steel and those who would have the Coast Guard aggregate the two.

Finally, determinations of steelweight falling within the range of 7.5% - 10.0% have been left to the discretion of the Agency so additional factors that may tend to justify the decision in a particular case (a non-exclusive list of possibilities for which were also published in the Notice of Proposed Rulemaking) may be taken into consideration. Since the Final Rule was promulgated in 1996, eight vessels with steelweight calculations exceeding 7.5% but less than 10% have been determined to not have been rebuilt (with an average steelweight percentage of 8.73%) for a variety of reasons related to the circumstances in each case.

It has perhaps been the "major component" parameter of the test which suffers the most from lack of express definition. This parameter refers to "major components" of the "hull" or "superstructure". The latter two terms are defined by regulation stipulated in 46 C.F.R. § 67.3, but the term "major component" has not been expressly defined. Moreover, even though not expressly defined, its use as a parameter to the current regulation received no comment from industry when it appeared in the Notice of Proposed Rulemaking. Nevertheless, the Coast Guard has looked for separately fabricated and identifiable items which are "added to the vessel" (as the regulation states). In so doing, the Coast Guard employed the same standard of 1.5% of discounted lightship weight as is employed in connection with U.S.-build determinations to determine whether any such components are major. It is worth noting as well that even though such a component may be determined by virtue of its steelweight not to be a major component, its steelweight is nonetheless factored into the other parameter of the regulation.

The following pertains to the recent decision by the District Court for the Eastern District of Virginia in the case of the vessel SEABULK TRADER. This case arose as a complaint by the Shipbuilder's Council of America for review of agency action and for declaratory and injunctive relief following the issuance by the Coast Guard on May 20, 2005 of a favorable preliminary rebuilt foreign determination as to the SEABULK TRADER and the SEABULK CHALLENGE, and the issuance of a Certificate of Documentation with a coastwise trade endorsement to the SEABULK TRADER on May 9, 2007, following the completion of previously described work in China. The work done to these vessels was precipitated by the requirements of the Oil Pollution Act of 1990, 46 U.S.C. § 3703(a) *et seq*, which required that the vessels be phased out of operation in 2011 unless an inner hull was constructed to form an OPA-90 compliant double hull.

On April 24, 2008, the District Court for the Eastern District of Virginia issued an adverse decision on that challenge to the Coast Guard's determination to issue a coastwise endorsement to the SEABULK TRADER. The Court ordered the Coast Guard to revoke the SEABULK TRADER's coastwise endorsement, and remanded the case back to the Coast Guard for further proceedings and consideration, as to whether (1) a major component was added to the vessel in China; (2) whether the foreign work

exceeded the permissible steelweight thresholds; and (3) whether the work resulted in the installation of required segregated ballast tanks which must by law be installed in the United States if a vessel desires to maintain its coastwise privileges.

On Seabulk's request, the Court granted a temporary stay pending appeal of 60 days on May 9, 2008, and directed the parties to begin negotiations on an appropriate appeal bond. The deadline for filing a notice of appeal is June 23, 2008. The Coast Guard is working closely with the Department of Justice on its next course of action in this case and, because the case is still in litigation, all other questions about it must be referred to the Department of Justice.

The parallels between the disposition of the Coast Guard's determination in the MONTERREY in 1989, which ultimately led to rulemaking, and the disposition of the Coast Guard's determination in the SEABULK TRADER in 2008 under that new rule, are certainly noteworthy even though it is not yet known where the SEABULK TRADER case may yet lead. In the former case, the Court rejected the "structural/nonstructural" test which had been applied for many years by the Coast Guard and found that the Coast Guard's approach was not entitled to deference. In the latter case, the Court found (referring in particular to its findings as to "major component") that this test, also applied for many years by the Coast Guard, had not been applied with a reasonable basis and that it was not entitled to deference.

FUTURE COURSES OF ACTION

Judicial Action

As previously mentioned, the Coast Guard cannot discuss its recommendation or intended action with respect to an appeal of the decision in the SEABULK TRADER. Perhaps clarity will result from actions by the courts in this matter. However, with regard to action by the courts generally, it seems equally possible that clarity of purpose going forward could be uncertain and might not necessarily resemble what the intent of Congress would likely be.

Agency Action

Similarly, as to a new rulemaking, such as was undertaken in the wake of the decision in the MONTEREY, it has been tried before, it is a laborious and time-consuming process, and, without clear and current guidance from Congress, may have little better prospect for resulting in a policy which is in line with Congressional purpose let alone acceptable to all competing interests. The two previous attempts at rulemaking have met with limited success.

Legislative Clarity

As aforementioned, the Coast Guard urges Congress to bring greater legislative clarity to the Jones Act. We have more than 50 years of experience with vessel determinations and are committed to working as extensively as necessary with Congress to garner more precise statutory context.

Thank you for the opportunity to testify today. I look forward to your questions.